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In the Supreme Court
of the United States

OCTOBER TERM, 1966.

No. 564

FRANK P. BATTAGLIA and THOMAS TORCHIA,
a partnership doing business as
PRODUCE TRANSPORT DISPATCH,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

On Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLANTS OPPOSING MOTIONS TO AFFIRM

Pursuant to Rule 16(3) of the Revised Rules of this Court, appellants file this brief opposing the motions to affirm filed herein by the railroad appellees and the United States and Interstate Commerce Commission.

STATEMENT

The statement of the case is set forth on pages 6 through 13 of appellants' Jurisdictional Statement. Rail-

road appellees take exception to the factual statements therein contained chiefly with respect to evidence in the record supporting appellants' assertion that frozen vegetables, berries, and fruits were transported in mixed loads. The location in the record of such evidence will be hereinafter specified.

The argument in railroad appellees' Motion proceeds along three lines:

(1) That the instant action is precluded by the doctrine of res judicata (at 3-5).

(2) That the Commission's denial of appellants' request for leave to file a petition for reconsideration of their "grandfather" application was a proper exercise of administrative discretion (at 5-6).

(3) That the proper standards were applied by the Commission in determining the scope of "grandfather" authority and the Commission's grant of "grandfather" authority to appellants conferred substantial parity (at 6-8).

Interestingly enough, the United States and the Commission in their motion to affirm do not argue the applicability of the doctrine of res judicata or the discretionary power of the Commission to summarily deny appellants' request for leave to file a petition for reconsideration.

It should be noted that in neither motion do appellees demonstrate that the standards pronounced by this Court in *Willis Shaw Frozen Exp., Inc.* v. *United States,* 377 U.S. 159 (1964), were actually or in effect applied

by the Commission in its "pre-Shaw" grant of "grandfather" authority to appellants. The reasons why such a demonstration is impossible are hereinafter developed.

ARGUMENT

1. The Willis Shaw standards were not applied by the Commission in delineating the scope of appellants' "grandfather" authority.

Preceding judicial review in *Willis Shaw Frozen Exp., Inc.* v. *United States,* Civil Action 1655, W.D. Ark., Feb. 11, 1963, reversed 377 U.S. 159, the Commission (in 89 M.C.C. 377) granted that carrier the right to haul frozen vegetables, berries, and fruits from named origins to named destinations and then, considering frozen vegetables, berries, and fruits separately made other point-to-point grants, and thus completely "atomized" Shaw's "grandfather" rights. On appeal, the district court decision sustaining the Commission's grant was reversed in a per curiam decision May 4, 1964, in which this Court stated:

> "We think *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475, 62 S. Ct. 722, 86 L. Ed. 971, requires reversal of the judgment and a remand to the Commission for reconsideration in light of appellant's status and performance as a common carrier, the transportation characteristics and marketing pattern of these seasonal agricultural products, and the demonstrated ability of appellant to perform the services." (*Willis Shaw Frozen Exp., Inc.* v. *United States, supra,* 377 U.S. at 159-160.)

This Court's decision in *Shaw* was foreshadowed and explained by the following district court decisions which pointed out in detail the errors the Commission was making in its "tabulator" approach in disposing of "grandfather" rights applications under the Transportation Act of 1958: *Winter Garden Company* v. *United States,* 211 F. Supp. 280 (E.D. Tenn. Oct. 22, 1962); *Jarman* v. *United States,* 219 F. Supp. 108 (D.Md. June 18, 1963); *Frozen Food Express* v. *United States,* 219 F. Supp. 131 (N.D. Tex. July 8, 1963); and *Hale Distributing Company* v. *United States,* 221 F. Supp. 266 (S.D. Cal. July 10, 1963).

While some of the errors pointed out by the district courts in the above decisions are not relevant to the instant case, all such errors resulted from the Commission's basically incorrect conception of its responsibility, the end result of which was "grandfather" grants so narrowly drawn as to bear no reasonable relationship to the purpose of the "grandfather" clause—to grant to those coming under regulation authority to continue existing operations.

The Commission, in its required reconsideration of the Shaw application (99 M.C.C. 141), concluded that the *Frozen Food Express* case, *supra,* correctly interpreted the *Winter Garden Company* case, *supra,* in holding that frozen vegetables, berries, and fruits may be found as a matter of fact to have been handled as a single commodity class. In its reconsideration of the Shaw application the Commission then stated:

"It is manifest that our function in administer-

ing the 1958 'grandfather' Act is not to freeze an applicant's operations into a precisely delineated, point-for-point operation exactly corresponding to points where shipments have previously moved if, in fact, that applicant has held itself out and provided service to representative points throughout a particular area or territory."

Prior to the *Shaw* decision, the Commission considered frozen vegetables, berries, and fruits separately as a matter of law. The following quotation from the Commission's report dated February 14, 1961 (J. S. at 37-38) is a typical statement of the Commission's former position:

"We do not agree with applicants' contention that shipments of the three involved commodities transported by them should be viewed collectively in establishing their bona fide operation. . . Section 7 of the Transportation Act of 1958 clearly enumerates several *specific classes* of commodities, including frozen fruits, frozen berries, and frozen vegetables, to which 'grandfather' applications may be directed. In our opinion, applicants here must establish their bona fide operation separately with respect to each commodity class involved.

"Bearing in mind the above, we believe that applicants have established the right to a certificate authorizing operations only from and to the points served by them both on and after the critical date as described in our findings." (The emphasis is the Commission's own.)

Were the Commission to reconsider its grant of "grandfather" authority to appellants *in the light of*

the Shaw decision, a conclusion that the three commodities were transported as a single class seems inevitable.

Although the railroad appellees state in their Motion at page 2 that they cannot find record evidence establishing that appellants hauled mixed loads of frozen vegetables, berries, and fruits, the shipment exhibits show approximately: 30 mixed shipments of vegetables and berries; 12 mixed shipments of vegetables and fruits; and 6 mixed shipments of berries and fruits transported after May 1, 1958. Of the shipments transported before the critical date, there was 1 mixed shipment of frozen vegetables and fruits and 1 mixed shipment of frozen vegetables and berries. Upon examination of these exhibits it can be found that many of the appellants' loads contained mixtures of frozen vegetables, berries, and fruits.

Since the Commission limited its consideration of appellants' operations to just those shipments before May 1, 1958, *which were repeated* after that date, identical both as to exact commodity and as to points of origin and destination, it was able to find that "Applicants have not transported any of the subject commodities to or from more than four points in any State involved." (J.S. at 38.) So confined, obviously the Commission was:

> ". . . unable to view these points served as sufficiently representative to warrant a finding that applicants' operations were substantial throughout the State-wide areas involved. We are not persuaded that we should take official notice, as requested by applicants, that the changing business

characteristics in the industries which applicants serve require flexible carrier service and that this fact should be considered in determining the scope of the grant here. While this situation, in truth, may exist, we do not believe that the relatively limited operations by applicants which occurred on or prior to May 1, 1958, appear compatible with the fact of which they seek to have us take notice." (J.S. at 38.)

As above appears, by reason of its self-imposed limitations, the Commission so confined its consideration of the facts of appellants' "grandfather" operations that the transportation characteristics of the three commodities were completely obscured.

As found by the Commission (J.S. at 35), 44 shipments were transported before the critical date. These shipments originated from 7 points in Oregon, 4 points in Washington, and 2 points in California. The shipments terminated at 2 points in Oregon, 2 points in Washington, and 5 points in California.

The 289 shipments transported after the critical date originated from 13 points in Oregon, 14 points in Washington, and 2 points in California. The shipments terminated at 3 points in Oregon, 3 points in Washington, and 37 points in California.

The large number of origin and destination points indicated in the shipment exhibits is evidence, not previously considered by the Commission, that origin and destination points change from year to year, which is attributable to the special characteristics of the com-

modities. Indeed, the very fact that a number of origin and destination points were served before but not after the critical date verifies the shifting nature of the origins and destinations. Only a grant of areawide authority under such circumstances allows continuance of the operations conducted on the critical date. An award of point-to-point authority in a situation where origins and destinations shift from year to year means that when the traffic thereafter shifts from a specified origin point or destination point to some other origin or destination point, however close to the specified point, a portion of the granted authority becomes worthless, and within a few years' time probably all of the granted point-to-point authority will be of little use. However, the Commission, prior to the *Shaw* decision, mechanically concluded that unless a shipment was made after the critical date which coincided with a shipment before the critical date, the carrier had failed to sustain the burden of proving continuity of operation between the two points.

It should also be noted that the Commission gave no consideration whatever to the holding out of appellants to transport frozen vegetables, berries, and fruits within the desired territory, and testimony that the points of origin and destination were subject to frequent change was limited by the examiner at the Commission hearing (Tr. 28-33). Surely it cannot be said that the Commission observed the *Shaw* guidelines by so circumscribing its consideration of the evidence of appellants' "grandfather" operations. Indeed, it is clear from its "pre-Shaw" determination herein (J.S. App. D)

that the Commission was observing restrictive criteria which were later condemned.

From the foregoing it seems more than probable that if the Commission reconsidered its grant of "grandfather" authority and applied the guidelines laid down in *Shaw* and in *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942), an enlarged grant of authority to appellants would ensue and substantial parity between appellants' future operations and prior bona fide operations would be assured.

The railroad appellees depreciate the significance of the *Shaw* decision to be but a simple reminder to the Commission to apply the 22-year-old standards laid down in the *Carolina* case. (Railroads' Motion at 4.) These appellees contend that the four district court decisions resulting in remands to the Commission, *supra,* are "not here relevant due to the dissimilarity of controlling facts." (Railroads' Motion at 7.) Surely railroad appellees will not argue with the proposition that the legal standards applied to all applications involving "grandfather" grants under the Transportation Act of 1958 should not vary from case to case. As for the facts of the various court decisions being dissimilar, reference to those cases will confirm that the facts of all are remarkably similar, as might be expected. At least, the various district courts felt that the facts were similar. All three district court decisions following the *Winter Garden* case, *supra,* cited that case and commented on the similarity of the factual situations insofar as the peculiarities of the traffic were concerned.

2. The Commission abused its discretion in denying appellants' request for leave to file a petition for reconsideration.

As stated by the United States and the Interstate Commerce Commission in their motion to affirm, subsequent to the *Shaw* case a number of applicants asked the Commission for leave to file petitions for reconsideration. "Where the Commission concluded that the applicant was entitled to broader authority, the petition was granted and the Commission's prior decision reconsidered in light of the *Shaw* decision." (Government's Motion at 4.) We submit that it was an abuse of the Commission's discretion to deny leave to file a petition for reconsideration and reject a tendered petition where, as here, it is so clearly established that the legal standards which were applied were improper. How can the Commission possibly determine whether an applicant is entitled to broader authority until it first applies the correct legal standards, as enunciated in the *Shaw* and *Carolina Freight* decisions? Presumably the Commission, under the veil of administrative discretion, made a private determination as to whether application of the correct legal standards would affect the results previously determined by the application of incorrect legal standards. Appellants do not dismiss the possibility that application of the correct standards will not result in a broader grant of "grandfather" authority. However, they believe they are entitled to something more than just the Commission's bare statement that the proper standards have now been applied but the result remains the same.

The Commission's grant of "grandfather" authority to appellants is contaminated in its entirety by the application of erroneous legal standards. The legal standars formerly employed by the Commission narrowed its consideration of the facts presented at the hearing to the extent that the transportation characteristics of these seasonal agricultural products were given little, if any, weight.

Whether application of the proper legal standards to the facts of appellants' "grandfather" operations would change the result is not the concern of the courts. The result can be considered to be proper only when the Commission has reconsidered the application on its merits and has used and observed the correct, lawful standards.

Railroad appellees dwell extensively on the time lag in the various proceedings involving appellants' grant of "grandfather" authority and the desirability of finality of administrative action. Appellants would remind railroad appellees that complaints arising from the Commission's use of incorrect legal standards have been voiced since the first grant of "atomized" authority under the Transportation Act of 1958. Footnote 3 to the Government's Motion lists five section 7(c) cases that were filed since this Court's decision in *Shaw,* of which two are still pending (Government's Motion at 6). The Commission created the problem, not appellants. To sum up in the words of Commissioner Brown, who still dissented to the report of the Commission upon reconsideration of the Willis Shaw "grandfather" application (99 M.C.C. 141):

> "What sound regulatory purposes could justify an approach that would prolong litigation almost 7 years? What irreparable harm would have ensued if the Commission had taken a liberal approach earlier?"

3. The 1962 District Court judgment does not preclude this action.

The contention of appellees that the proper legal standards were applied by the Commission in determining the scope of appellants' "grandfather" operations is weak and indefensible. Thus it is quite understandable that the railroad appellees would raise the question of res judicata. (Railroads' Motion at 3-5)

Res judicata would not seem to be involved if this case is considered simply as one involving an abuse of discretion by the Commission in failing to entertain appellants' petition for reconsideration of its "grandfather" application in the light of the *Shaw* decision. In any event, the doctrine of res judicata should not be applied here. As this Court stated in *State Farm Mutual Ins. Co.* v. *Duel,* 324 U.S. 154 at 162:

> ". . . res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation."

It may be, as railroad appellees emphasize in their Motion at page 4, that the *Shaw* decision made no new or different law; that the law has remained the same since the 1942 *Carolina* case. But there was certainly a change in the law as previously applied by the Com-

mission. Clearly there has been an intervening decision (*Shaw*) and an altered situation has been created.

CONCLUSION

For the reasons above stated appellants request that the Court deny the motions to affirm and note probable jurisdiction of this appeal. As set forth in the Jurisdictional Statement, appellants have respectfully suggested, as an alternative, that the District Court below be summarily reversed and this case be remanded to the Commission for reconsideration inasmuch as the Commission's error is plain and can be rectified by reconsideration by that agency.

Respectfully submitted,

EARLE V. WHITE
WHITE & SOUTHWELL
2130 S. W. Fifth Avenue
Portland, Oregon 97201
Attorneys for Appellants